BLANK
PAGE

BLANK
PAGE

INDEX

	Page
Statement	1
Argument	3
Cases Cited by Opposing Counsel	5
Conclusion	6

TABLE OF CASES CITED

Consolo v. Maritime Commission, 383 U.S. 607	3
FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 143	3
Gilbertsville Trucking Co. v. U. S., 371 U.S. 115, 129	3
Heavy-Specialized Carriers Conference v. U. S., 231 Fed. Supp. 968	4
I. C. C. v. Atlantic Coast Line, 383 U.S. 576, 601	4
Kirschbaum v. Walling, 316 U.S. 517, 523	4
Pittsburgh Towing Co. cases:	
317 I.C.C. 661	2
321 I.C.C. 366	2
324 I.C.C. 460	2

BLANK PAGE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 319

MISSISSIPPI VALLEY BARGE LINE COMPANY, ET AL.,
Appellees,

v.

UNITED STATES OF AMERICA ET AL. (Pittsburgh Towing Company), *Appellants*

On Appeal From the United States District Court for the Eastern District of Missouri—Eastern Division

---

REPLY TO MOTION TO DISMISS OR AFFIRM AND MOTION TO REVERSE

STATEMENT

It is true that the docketing of this case was not timely under Rules 13 (1) and 14 (2). This delay was occasioned by a misunderstanding between Counsel for appellant, for which we humbly apologize to the Court. We shall take care that such delay will not occur again. We suggest to the Court that this delay has injured no one and does not affect the jurisdiction or merits of the case. It is in the best interest of the public that this case be considered on its merits, the motion to dismiss denied, and to reverse granted.

The Statement of facts, pages 2 through 6 of the Motion to Dismiss, is substantially correct except for the following:

(a) The jurisdictional statement was corrected and indicates that the notice of appeal was filed April 15th, 1966, and counsel was notified of this correction.

(b) The Report of the Commission contains a full statement of the case, including the fact that Pittsburgh Towing Co. at the time of filing the initial application was not a carrier subject to regulation.

(c) The Commission decided the issue in this proceeding four times in favor of Pittsburgh Towing Co., two are unreported but three are reported at:

324 I.C.C. 460 [1]
321 I.C.C. 366 [2]
317 I.C.C. 661 [3]

---

[1] Report on reconsideration.

[2] Decided Nov. 22 '63, holding inter alia; page 371, "We further find that such rates when applied in connection with exclusive use of outside towage are just and reasonable and otherwise lawful."

[3] Decided Apr. 9 '63, holding inter alia, page 667, "At the date of consummation, Zubik was faced with such personal problems that his services as an officer or director were not available to transferee. Osbourne is well qualified to manage transferee's operations. He is a graduate of the United States Merchant Marine Academy and is licensed as a master for river vessels. He has been connected with water transportation since he was a youth, was one of the founders of the Waterways Freight Bureau, and is a founder member of the American Society of Traffic and Transportation." It seems quite obvious that the Commission considered the talents of Osbourne to be an advantage to the Public Interest.

ARGUMENT

Our first point is that, if the decision and order (App. "B") of the Commission have a rational basis, the District Court had no authority to review the discretionary action of the Commission. In a recent decision, *Consolo* v. *Federal Maritime Commission,* March 22, 1966, 383 U.S. 607, this honorable court said (even if the District Court had power to review), that if two conclusions might be drawn from the record before the agency, the orders of the agency would be sustained.

Our second point is that questions of public interest are committed exclusively to the Commission. *Gilbertsville Trucking Co.* v. *United States,* 371 U.S. 115-129. The measure of the public interest is not a reviewable question for the District Courts.

The Commission found that transferor Zubik had not filed Reports, but Zubik had eight towboats operating when this application for transfer was filed. (Page 13a App. "B" J.S.) (317 I.C.C. 662).

The Court below erred in placing too much emphasis on the letter of notice sent out by Zubik to competitors, on July 7, 1960. (J.S. 5a) The law concerning legal notice is well established to the effect that when the Commission reopened the case and set it for public hearing the form and substance of the letter of notice became moot. The Commission has since abolished such procedure and all notices are published in the Federal Register.

We also wish to direct attention to the decision of this Court in the case of *FCC* v. *Pottsville Broadcasting Co.,* 309 U.S. 134, 143, in which it was held that agencies have the power to interpret and apply their own rules and the Courts are bound by them. In deal-

ing with the rules of the I.C.C. the Court applied a stronger expression in *Kirshbaum* v. *Walling,* 316 U.S. 517, 523.

We suggest that the Court below erred in failing to remand. If the District Court had power to review this discretionary action of the agency, then it should have made proper findings and remanded the case for further action consistent with such findings. Congress did not intend to empower the district courts to both review and perform the administrative duties of agencies. *I.C.C.* v. *Atlantic Coast Line,* 383 U.S. 576-601. There is grave doubt that the districts courts have power to even review matters which have been committed to the discretion of the Commission.[1]

We deem it appropriate to direct the attention of the Court to a decision by the District Court sitting in this same District of Missouri and two members of the Court were the same as in the case here on appeal, *Heavy Specialized Carriers Conference, et al.* v. *United States,* 231 Fed. Supp. 968.[2] We realize that each case

---

[1] See Chapters 28 and 29, Administrative Law, by Kenneth Culp Davis.

[2] This decision, filed July 22 '64 was not appealed and it held inter alia,

"The scope of judicial review is narrow and we cannot substitute our own view for that of the ICC, if its view is supported by substantial evidence and is not arbitrary or capricious. *United States* v. *Pierce Auto Lines,* 327 U.S. 515; *Interstate Commerce Commission* v. *Jersey City,* 322 U.S. 503; *Rochester Tel. Corp.* v. *United States,* 307 U.S. 125; *Mississippi Valley Barge Co.* v. *United States,* 292 U.S. 282."

"The interpretation of a certificate issued by the ICC is properly with the ICC and not the courts. *Service Transfer Co.* v. *Virginia,* 359 U.S. 171; *Nelson, Inc.,* v. *United States,* 355 U.S. 554; *Malone Freight Lines, Inc.* v. *United States,* 107 F. Supp. 946 (N.D. Ala. 1952), aff'd 344 U.S. 925."

may be quite different in factual details but in dealing with questions of broad import that might establish an unfortunate precedent in applying our National Transportation Policy to accord with the Public Interest in the future there must be some degree of comity and for this reason the agency should have the duty and obligation of supervising such determinations.

CASES CITED BY OPPOSING COUNSEL

Careful consideration has been given to the cases cited in support of the Motion to Dismiss and Affirm. We find no support in these cited cases for the theory that a district court may upon the basis of an unusually caustic and critical Memorandum Opinion enter a decree based solely upon the administration of one of the procedural rules of an agency and refuse to give that agency an opportunity to take further action, on remand. Indeed, we find no such supporting decisions, whether opposing Counsel has cited them or not. We contend that the Interstate Commerce Commission has, in its Report (App. "B") answered every question raised in the Court below. This agency, the Commission, is charged by Congress to protect the public interest and this includes protection for small carriers as well as large carriers.

Under the terms of the present injunctive decree, it is doubtful that Pittsburgh Towing Co., could have a further hearing before the Commission to cure a deficiency of proof. Due process of law before the agency is therefore frozen.

CONCLUSION

It is respectfully submitted that the motion to Dismiss and Affirm is without merit and should be denied and that this motion to Reverse and Remand should be granted, with such appropriate instructions as this Honorable Court may deem wise and proper to protect the public interest and the National Transportation Policy.

ERNEST L. KEATHLEY
818 Olive Street,
St. Louis, Mo.

ERNIE ADAMSON
Box 62
Middleburg, Virginia

Attorneys for Appellants.

Date: August 11, 1966

BLANK
PAGE